IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1056

HOWARD MECHANIC and LAWRENCE KOGAN,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR ALLOWING THE WRIT	5
A. Double Jeopardy	5
B. The Violation of the Attorney General's Directive	8
CONCLUSION	10
APPENDICES:	
Appendix A—The Opinion Below	1a
Appendix B—Department of Justice Release	1b

TABLE OF AUTHORITIES

Cases:

Abbate v. United States, 359 U.S. 187 (1959)	5, 6, 7, 8
Bartkus v. Illinois, 359 U.S. 121 (1959)	6, 8
Benton v. Maryland, 395 U.S. 784 (1969)	6
Bolling v. Sharpe, 347 U.S. 497 (1954)	10
Cox v. United States, 370 F.2d 563 (9th Cir. 1967)	9
Feldman v. United States, 322 U.S. 487 (1944)	5
Fox v. Ohio, 5 How. 410 (1847)	7
Mechanic v. Greensfelder, 461 S.W.2d 298 (St. Louis, Mo. Ct. App. 1970)	2, 3
Murphy v. Waterfront Commission, 378 U.S. 52 (1964)	6
Palko v. Connecticut, 302 U.S. 319 (1937)	6
Petite v. United States, 361 U.S. 529 (1960)	9
Redmond v. United States, 384 U.S. 264 (1966)	9
Shapiro v. Thompson, 394 U.S. 618 (1969)	10

United States v. Lanza, 260 U.S. 377 (1922) 5, 7
United States v. Murdock, 204 U.S. 141 (1931) 5
Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

Statutes:

18 U.S.C. § 231(a)(3) 1
18 U.S.C. § 1254(1) 2
18 U.S.C. § 4208(b) 4, 5

Miscellaneous:

Webster's Third New International Dictionary (Unabridged, 1961) 3

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Howard Mechanic and Lawrence Kogan petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit which affirmed judgments of the United States District Court for the Eastern District of Missouri convicting petitioners of violating 18 U.S.C. § 231(a)(3).

OPINION BELOW

The opinion below has not yet been reported. It is appended hereto as Appendix A.

JURISDICTION

The judgment sought to be reviewed is dated and was entered on December 22, 1971. On January 13, 1972, the court below entered an order without opinion denying a timely-filed petition for rehearing. On February 2, 1972, Mr. Justice Blackmun entered an order extending to and including February 19, 1972, the time for the filing of this petition. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment barred the federal prosecution of petitioners for the same acts for which they had been prosecuted and convicted in a State court.

2. Whether the prosecution was barred because the United States Attorney did not comply with a directive of the Attorney General requiring his approval before trying a federal case for substantially the same acts which have been the subject of a state prosecution against the same defendant.

STATEMENT OF THE CASE

On March 24, 1970, Washington University, located in St. Louis County, Missouri, obtained from the Circuit Court for St. Louis County an ex parte temporary restraining order enjoining several named individuals and members of their "class" from engaging in various kinds of disorderly conduct on University property.[1] Among those named were Mechanic and Kogan, the petitioners in this case.

On the evening of May 4, 1970, a demonstration was held on the University campus to protest the killing by National Guardsmen earlier that day of four students at

[1]The temporary restraining order is quoted in *Mechanic v. Greensfelder*, 461 S.W.2d 298 (St. Louis, Mo. Ct. App. 1970).

Kent State University in Ohio. The demonstrators marched to the Air Force and Army R.O.T.C. buildings on the campus. Soon after midnight, a fire broke out in the Air Force R.O.T.C. building. Two fire trucks came to the scene, but were driven away by a barrage of missiles from the crowd. Upon the arrival of a third fire truck, County police appeared and formed a line between the firemen and the demonstrators. Members of the crowd hurled missiles at the police and firemen.

On May 5, the University instituted contempt proceedings in the Circuit Court for St. Louis County against Mechanic, Kogan and others, charging that they had violated the temporary restraining order during the events just described. After a trial which began on May 25, 1970 and ended on June 11, 1970, the court found the defendants guilty of violating the temporary restraining order and sentenced them for criminal contempt. Mechanic and Kogan were each sentenced to imprisonment in the County jail for six months and a $500 fine, on findings that each of them had hurled an explosive device in the direction of a policeman during the fire at the Air Force R.O.T.C. building. These findings were based on the testimony of a student, Donald Bird, who testified that he had seen Mechanic and Kogan each propel a cherry bomb[2] which exploded near a police officer.

Mechanic and Kogan brought a habeas corpus action attacking the validity of their contempt convictions. The action was unsuccessful. *Mechanic v. Greensfelder, supra.* Mechanic and Kogan served the larger part of their sentences and were then paroled.

On July 8, 1970, Mechanic and Kogan were separately indicted in the Eastern District for Missouri. Each indictment alleged that on May 5, 1970, the defendant:

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[2] "Cherry bomb (so called for its cherrylike shape and color): a powerful globular red firecracker detonated by lighting a relatively long fuse." Webster's Third New International Dictionary (Unabridged, 1961).

"willfully did commit an act to obstruct, impede and interfere with a fireman of the Clayton Fire Department and a law enforcement officer of the St. Louis County Police Department, then lawfully engaged in the lawful performance of their official duties, incident to and during the commission of a civil disorder, which said civil disorder obstructed, delayed and adversely affected the conduct and performance of a federally protected function, in that the said [defendant] did throw and propel a missile commonly called a cherry bomb at the said fireman and said law enforcement officer.

"In violation of Section 231(a)(3), Title 18, United States Code."

Mechanic and Kogan moved to dismiss the indictments on the ground, inter alia, that they had been prosecuted for the same acts in the contempt proceeding in the Circuit Court for St. Louis County. The motions were denied.

Mechanic's trial began on October 19, 1970, and a guilty verdict was returned on October 22, 1970. Kogan's trial began on February 8, 1971, and a guilty verdict was returned on February 12, 1971. The United States Attorney did not apply to or obtain approval from the Department of Justice for trying the cases, thereby contravening a directive of the Attorney General (Appendix B hereto) requiring such approval when a defendant has previously been prosecuted by State authorities for substantially the same acts.

At the trials, Donald Bird repeated the testimony he had given in the State contempt trial. There was no other evidence that Mechanic or Kogan had committed acts within the purview of the statute. Mechanic and Kogan denied throwing objects, and their testimony was supported by other witnesses.

Mechanic was sentenced to five years imprisonment. Kogan was sentenced to five years imprisonment and a fine of $10,000, subject to later revision in accordance with 18

U.S.C. §4208(b). The Court of Appeals for the Eighth Circuit affirmed the convictions.

REASONS FOR ALLOWING THE WRIT

A. Double Jeopardy

The constitutionality of successive State and federal prosecutions for the same acts was last examined by the Court on March 30, 1959, in *Abbate v. United States*, 359 U.S. 187. *Abbate* held (Chief Justice Warren and Justices Black and Douglas dissenting) that the double jeopardy clause of the Fifth Amendment did not bar federal prosecution of defendants for acts for which they had already been prosecuted and convicted in a State trial. *Abbate* declined (at 195) to overrule its precursor, *United States v. Lanza*, 260 U.S. 377 (1922), on the ground that no new "consideration or persuasive reason" had been advanced for departing from "its firmly established principle."

Developments since *Abbate*, including significant changes in constitutional doctrine, furnish new "considerations and persuasive reasons" for reconsidering *Abbate* and *Lanza*.

1. The theory on which *Lanza* and *Abbate* rest is that the state and federal government are "separate sovereignities," so that the same act constitutes two separate offenses if it violates both a State and a federal criminal statute. No other plausible rationalization has been or can be advanced to enable a successive federal prosecution to escape the unequivocal language of the Fifth Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy."

The doctrine of "separate sovereignties" was at one time as much an accouterment of the privilege against self incrimination as of the double jeopardy clause. *Feldman v. United States*, 322 U.S. 487 (1944); *United States v. Murdock*, 204 U.S. 141 (1931). In 1964, however, these deci-

sions were expressly overruled by *Murphy v. Waterfront Commission*, 378 U.S. 52, which held (at 77-78) "that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." This holding, as Justice Harlan pointed out (at 89), "discarded the 'separate sovereignty' theory of self-incrimination."

Under *Murphy*, State and federal tribunals are not agencies of "separate sovereignties" for the purposes of the self-incrimination clause. If that clause is not qualified by a concept of "separate sovereignties," it is impossible, in principle, to see how the preceding, allied clause of the Fifth Amendment prohibiting double jeopardy can be so qualified.

The Court should review this case in order to determine whether *Murphy* has excised the theoretical underpinning of *Lanza* and *Abbate*, and, if so, whether their holdings can survive the operation.

2. It seem inevitable that *Abbate* was influenced by *Bartkus v. Illinois*, 359 U.S. 121 (1959), decided the same day by the same 6-3 division. *Bartkus* held that the Constitution did not prohibit a State from prosecuting individuals for a bank robbery of which they had been acquitted in a prior federal trial. In reaching this result, the Court, reiterating *Palko v. Connecticut*, 302 U.S. 319 (1937), held that the double jeopardy clause of the Fifth Amendment does not apply to the States. *Palko* has been overruled, and the foundation of *Bartkus* eliminated, by *Benton v. Maryland*, 395 U.S. 784 (1969).

3. *Abbate* (at 195) expressed one of the concerns which motivated the decision: "[U]nless the federal authorities could somehow insure that there would be no state prosecutions for particular acts that also constitute federal offenses, the efficiency of federal law enforcement must suffer if the Double Jeopardy clause prevents successive state and federal prosecutions. Needless to say, it would be

highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses."

Experience has shown that the problem visualized in this passage is insubstantial. Since *Abbate*, and indeed since *Lanza*, the instances of successive state-federal prosecutions have been extremely rare. See Appendix B hereto. The paucity of such prosecutions demonstrates that their complete elimination would not significantly impair "the efficiency of federal law enforcement."

Moreover, as federal law enforcement agencies have expanded, they are able to and do keep informed of State investigations and prosecutions of offenses which may have a significant impact on federal interests. And State law enforcement authorities rarely have the capacity or desire to cope with major federal transgressions, and prefer to leave the handling of such matters to federal authorities. If there should be residual problems in the event of an overruling of *Abbate*, these could be effectively resolved by federal legislation.

In *Lanza*, the Court consoled itself for its decision by quoting (at 383) a passage from *Fox v. Ohio*, 5 How. 410, 435 (1847), which began: "It is almost certain, that, in the benignant spirit in which the institutions both of the state and Federal systems are administered, an offender who should have suffered the penalties denounced by the one should not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor." The fact is, however, that successive prosecutions are not characteristically brought "in instances of peculiar enormity" or for extraordinary exigencies of "public safety." Instead, they generally reflect a passing public hysteria against the scapegoats of the moment. This case is illustrative. A sentence of six months imprisonment and $500 fine was an ample sanction for the throwing of a firecracker which exploded

without injury to person or property. The addition of a federal prosecution and five years imprisonment is attributable to the same unreasoning fear and animus against demonstrating students which occasioned the Kent State killings which were protested at Washington University.

B. The Violation of the Attorney General's Directive

On April 6, 1959, a week after the decisions in *Abbate* and *Bartkus*, the Attorney General released a "Memorandum to the United States Attorneys," which appears in Appendix B hereto. Referring to the reaffirmance by these decisions "of the existence of a power to prosecute a defendant under both federal and state law for the same act or acts," the Memorandum stated that its purpose was to insure a continuation of the policy of the Department of Justice to use that power sparingly. It added, "After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling." The Memorandum concluded: ". . . no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention."

In the present case, there can be little doubt that the federal prosecution of petitioners violated the Attorney General's substantive policy of no successive prosecution "unless the reasons are compelling", except for a remote possibility that such reasons were supplied by facts outside the record. There is no doubt that the United States Attorney violated the procedural part of the Attorney General's directive by not clearing the prosecution with the Department of Justice.

Whether the conviction can stand in the light of this violation of the Attorney General's directive is a question

which touches on the fairness and reputation of the administration of justice and which involves several substantial legal issues.

1. The first issue is whether the convictions should be set aside because the prosecutions were ultra vires and defied the authority of the Attorney General to "supervise all litigation to which the United States is a party" and to "direct all United States attorneys . . . in the discharge of their . . . duties." 28 U.S.C. § 519. In *Petite v. United States*, 361 U.S. 529 (1960), the Court held that vacation of a conviction without reaching the merits was the appropriate course where a prosecution had violated the substantive policy of the same April 6, 1959 Memorandum which was disregarded in this case. Like dispositions were made in *Redmond v. United States*, 384 U.S. 264 (1966), and *Cox v. United States*, 370 F.2d 563 (9th Cir. 1967), where the prosecutions violated policies of the Attorney General in the obscenity field. It would be a natural extension to apply the rule of these cases to the situation here, where the prosecutions disregarded a procedural requirement designed by the Attorney General to preserve a substantive policy, and where, from all indications, this dereliction resulted in a flagrant violation of the substantive policy.

2. In *Cox v. United States, supra*, the Ninth Circuit had before it a case which appeared to represent a violation of the policy announced by the Attorney General in *Redmond*. The court therefore requested the Solicitor General for an expression of his views, following which the Department of Justice moved to vacate the convictions and dismiss the indictment. The present case appears to represent a violation of the substantive policy expressed by the Attorney General in his April 6, 1969, Memorandum and in *Petite*, and the Eighth Circuit admitted that the failure to obtain approval of the Attorney General "troubles us." Nevertheless, the court failed to adopt the common-sense course of the Ninth Circuit in *Cox*. This difference in treatment is a conflict of circuits which should be resolved by this Court.

3. If, as seems likely, the prosecutions below violated the substantive policy of the Department of Justice, it would appear that petitioners have been denied the equal protection of the laws in violation of the due process clause of the Fifth Amendment. Cf. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Shapiro v. Thompson,* 394 U.S. 618, 642 (1969); *Bolling v. Sharpe,* 347 U.S. 497 (1954). The only realistic way to prevent such an unconstitutional result is to vacate convictions whenever the United States Attorney has violated the clearance requirement of the Attorney General's directive on successive prosecutions.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 71-1022

United States of America,
Plaintiff-Appellee,

v.

Howard Mechanic,
Defendant-Appellant.

No. 71-1117

United States of America,
Plaintiff-Appellee,

v.

Lawrence Kogan,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Missouri.

December 22, 1971.

Before VAN OOSTERHOUT, HEANEY and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

The defendants, Howard Mechanic and Lawrence Kogan, bring direct appeals from their convictions by juries for

violation of 18 U.S.C. §231(a)(3), one of the anti-riot provisions of the Civil Obedience Act of 1968. Mechanic was sentenced to five years in the custody of the Attorney General; Kogan was sentenced under the provisions of 18 U.S.C. §4208(b).

Although the defendants were tried separately, substantially the same witnesses were produced and the same evidence adduced at each trial.

The evidence showed that on the evening of May 4, 1970,[1] a protest demonstration took place on the campus of Washington University, St. Louis County, Missouri. Following this demonstration, a large number of protesters marched to the vicinity of the campus's Air Force and Army R.O.T.C. buildings. Estimates of the size of the crowd at the R.O.T.C. buildings ranged from one hundred to three thousand persons; most estimates were between five hundred and one thousand demonstrators. The demonstrators began throwing stones at the R.O.T.C. buildings.

Shortly after midnight, a fire, which had apparently been set, broke out in the Air Force R.O.T.C. building. A fire truck came to the scene, but retreated from the area of the fire under an intense barrage of rocks, bottles, and other items thrown by the crowd. A second fire truck met the same fate and also retreated.

Shortly after midnight, a third fire truck came on the scene. Fifteen St. Louis County Police Officers arrived and formed a protective line between the firemen and the

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[1] The demonstration was in protest of the killing of four college students by National Guardsmen on the campus of Kent State University in Ohio, which had occurred earlier in the day.

demonstrators. The police were dressed in riot gear and were easily identifiable as law officers. Nevertheless, the fire truck, the firemen, and the police officers were continually subjected to a barrage of bricks, stones, glass, and cherry bombs. One police officer was slightly injured when struck by debris from an explosion. The third fire truck eventually extinguished the blaze in the R.O.T.C. building at around 1:00 A.M. on May 5.

A Washington University Law School student, Donald Bird, stood about five or six feet from the defendant Howard Mechanic at the height of the fire. He testified that he saw Mechanic propel a cherry bomb in the direction of the police line and saw it explode at or about the knee level of one of the patrolmen. Bird also testified that he saw Lawrence Kogan, standing a few feet from Mechanic, throw a cherry bomb which exploded five or six feet from a police officer.

The evidence clearly established that many persons committed acts of violence during the late night and early morning hours of May 4 and 5, 1970. In addition to the throwing of the previously described objects and the burning of the Air Force R.O.T.C. building, the Army R.O.T.C. building was ransacked. At least one injured person was taken to the hospital by ambulance. Several witnesses testified that they were injured or feared for their safety. There was no evidence that either of the defendants undertook any act of violence other than the throwing of the cherry bombs.

The defendants raise several issues on appeal. We consider them separately.

CONSTITUTIONAL POWER OF CONGRESS TO ENACT 18 U.S.C. §231(a)(3)

The statute under which the defendants were convicted reads:

> "(3) Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—
>
> "Shall be fined not more than $10,000 or imprisoned not more than five years, or both."

The defendants contend that this statute is invalid because it exceeds Congress's power under the Commerce Clause.

We need not determine whether Congress has power to reach the conduct involved in this case under the Commerce Clause, since the statute is also directed at such activity when it affects "* * * the conduct or performance of any federally protected function." The case was tried on the theory that the civil disorder affected a federally protected function, namely the R.O.T.C. program and the buildings housing it. We must determine whether, on this basis, Congress has power to punish the defendants' activities in this case. See, *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971); *United States* v. *Raines*, 362 U.S. 17 (1960).

A federally protected function is defined by 18 U.S.C. §232(3) as:

> "* * * any function, operation, or action carried out, under the laws of the United States, by any department, agency, or instrumentality of the United States or by an officer or employee thereof * * *."

There is no question that the R.O.T.C. programs and their supporting facilities fall within the statutory definition of "federally protected function." Congress, pursuant to its constitutional power to raise armies, has created the R.O.T.C. programs, 10 U.S.C. §§2201 *et seq.*, and Congress has the power to protect them from destruction. It has chosen to do so by assuring that persons, charged with protecting R.O.T.C. installations from destruction by fire, be permitted to perform their duties unimpeded.

OTHER CONSTITUTIONAL QUESTIONS

The defendants contend that the statute under which they were convicted is unconstitutional in four additional ways:

(1) it violates the First Amendment in that it prohibits constitutionally protected speech;

(2) it is vague and overly broad;

(3) it does not require the government to prove criminal intent;

(4) it does not require the government to prove that the defendants had knowledge of the official status of the individuals against whom their acts, or attempted acts, were directed.

We consider these contentions in order.

First Amendment

The short answer to the defendants' contention that the statute prohibits protected speech is that, as we read it, §231(a)(3) has no application to speech, but applies only to violent physical acts.

The operative words of the statute are "whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer • • •". Thus, the section applies only to a person who acts to impede, obstruct, or interfere with an official described in the statute. *National Mobilization Com. to End War in Viet Nam* v. *Foran*, 411 F.2d 934, 937 (7th Cir. 1969).

This Court stands ready to protect constitutionally guaranteed activities or conduct from interference by either the State or private individuals. We are willing to do so even though the conduct may be offensive to others. See, *Action, et al., Percy Green* v. *Rowland E. Gannon, et al.*, No. 20,182 (Nov. 3, 1971). But the conduct involved here is not entitled to constitutional protection.

The First Amendment has not been extended to protect rioting, inciting to riot, or other forms of physical violence. *National Mobilization Com. to End War in Viet Nam* v. *Foran*, 297 F.Supp. 1, 4 (N.D. Ill. 1968), *aff'd* 411 F.2d 934 (7th Cir. 1969). See, *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Feiner* v. *New York*, 340 U.S. 315 (1951), *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Nor has it been construed to protect, as symbolic speech, the act of throwing cherry bombs at police officers and firemen. See, *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Cameron* v. *Johnson*, 390 U.S. 611 (1968); *Adderley* v. *Florida*, 385 U.S. 39 (1966).

The United States District Court for the Northern District of Illinois considered the argument that §231(a)(3) and §232, the accompanying definitional section, prohibit constitutionally protected free speech and reached the same result that we do here. *National Mobilization Com. to End War in Viet Nam* v. *Foran, supra* at 297 F.Supp. 1, *aff'd* 411 F.2d 934.

Is Section 232 Vague and Overly Broad?

The defendants urge that the statute is vague and overly broad because the term "civil disorder" is inadequately defined. Under §231(a)(3), the conduct charged in this case is unlawful only if the policeman or fireman was engaged in his duties incident to and during the commission of a "civil disorder". As defined by §232,

> "(1) The term 'civil disorder' means any public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in damage or injury to the property or person of any other individual."

The defendants maintain that a "public disturbance" may cover meetings, demonstrations, and other constitutionally protected activities. They cite cases in which statutes, which make criminal conduct constituting a "public disturbance," have been found unconstitutional on the grounds of vagueness and overbreadth. The essence of their argument is that

> "• • • *Any* constitutionally protected expression of views in a speech, an assembly, a demonstration, which invokes that quality of 'hazardous freedom' described by the [Supreme] Court in *Tinker* [v. *Des Moines School District*, 393 U.S. 503 (1969)] and is, therefore, swept into the broad 'net' of the term

'public disturbance,' becomes the subject of criminal prosecution merely by having an assemblage of three or more persons who are present at the occasion participate in an 'act of violence' which may or may not result in actual damage or injury to a person or property. * * *" (Emphasis included.)

This argument misses the point.

First, as we pointed out in the preceding section, the statute does not purport to reach speech of any kind. It reaches only acts to impede, obstruct, or interfere with police officers and firemen. The crime set forth by the statute is not mere presence at a civil disorder, as the defendants assume, but an act committed during the course of such a disorder. The term "civil disorder" simply describes the environment in which the act must be committed in order to be subject to prosecution under §231(a)(3).

Second, since the statute does not attempt to curtail speech the defendants may not challenge it as vague or overly broad if their own conduct may be constitutionally prohibited, since "* * * one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * *" *United States* v. *Raines, supra* at 21, and cases cited therein. See, dissenting opinion of Mr. Justice White in *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971).

Third, the term "public disturbance" has not been used by the Congress in isolation. Rather, its scope is consistently narrowed by each subsequent phrase of the definition of "civil disorder." Thus, it is not just *any* public

disturbance which is the subject of the section, but only public disturbances which (1) involve acts of violence (2) by assemblages of three or more persons, and which (3) cause immediate danger of or result in injury to (4) the property or person of any other individual.[2]

A statute may not forbid the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). It will be found void for vagueness and overbreadth if it fails to give a person of ordinary intelligence fair notice that his conduct is forbidden by the statute. *Palmer* v. *City of Euclid*, 402 U.S. 544 (1971). We think that §232, read in conjunction with §231(a)(3), is sufficiently clear that a normally intelligent person could ascertain its meaning and would be given fair notice of whether or not his conduct is forbidden under it.

The evidence established that acts of violence were committed by many persons assembled in the area of the R.O.T.C. buildings on the night of May 4 and 5. The statute thus clearly put the defendants on notice that their act of throwing cherry bombs at police and firemen engaged in extinguishing the R.O.T.C. fire was prohibited, so long as that act was committed during a "civil disorder."

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[2] The defendants contend that §232 should be held unconstitutional because it would permit a conviction in a situation where only one person commits an act of violence while part of an assemblage of three or more persons. We need not decide whether the statute covers the situation which the defendants postulate since it is clear that, in this case more than three persons committed acts of violence. It is, therefore, unnecessary for us to decide the constitutional question raised by the defendants. See, *United States* v. *Raines*, 362 U.S. 17 (1960).

Intent

The defendants contend that the statute denies them due process because it does not specifically require that the government establish intent as an essential element of its case. We do not agree.

The only judicial construction of §231 has found that intent is an essential element of the offense.

> "* * * It is true that Section 231(a)(3) does not specifically refer to intent, but it only applies to a person who 'commits or attempts to commit any act to obstruct, impede, or interfere' with firemen or law enforcement officers. Under such phraseology, it will not be presumed that Congress intended strict liability for inadvertent or accidental occurrences where, as here, the crime is grounded on the common law. *Morissette* v. *United States,* 342 U.S. 246, 262-263 * * *."

National Mobilization Com. to End War in Viet Nam v. *Foran, supra* at 411 F.2d 937.

We agree that §231(a)(3) must be construed to require intent.

Furthermore, the indictment charged that the defendants acted with intent. The jury was instructed that, in order to convict, it must find that the defendants had acted with intent. We can only assume that, by returning a verdict of guilty, the jury concluded that the defendants had acted with intent.

Knowledge of Official Status

The defendants argue that the statute does not require, nor did the government prove, that the defendants knew that the individuals at whom they threw the cherry bombs were either policemen or firemen.

At Kogan's trial, the jury was instructed that an essential element of the offense was knowledge that the person at whom he threw the cherry bomb was a policeman or fireman. A similar instruction was requested by Mechanic, but it was refused. We feel it is preferable to follow the practice of the trial court in the Kogan case. But in his case, as in Mechanic's, the government proved that the police and firemen were in full uniform. Thus, we feel that knowledge of official status was sufficiently proved, and any failure to instruct on knowledge of official status was harmless to Mechanic. Furthermore, the defendants do not contend that they were unaware of the official status of the persons at whom they directed their missiles.

The Seventh Circuit has decided that knowledge of official status is not an essential element of the offense. *National Mobilization Com. to End War in Viet Nam* v. *Foran, supra* at 411 F.2d 934. We need not finally decide this question for ourselves since we think the evidence was sufficient to show that the defendants had such knowledge in any event.[3]

DOUBLE JEOPARDY ISSUE

The defendants argue that this prosecution violates the double jeopardy provisions of the Fifth Amendment.

Both defendants were convicted in state court of contempt of court for violating a temporary restraining order

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3 Several cases construing a similar statute, 18 U.S.C. §111 (assault on a federal officer), have found knowledge of official status not to be an element of the offense. *United States* v. *Leach*, 429 F.2d 956 (8th Cir. 1970), *cert. denied*, 402 U.S. 986 (1971); *United States* v. *Goodwin*, 440 F.2d 1152 (3rd Cir. 1971); *United States* v. *Marcello*, 423 F.2d 993 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970); *United States* v. *Kartman*, 417 F.2d 893 (9th Cir. 1969); *United States* v. *Wallace*, 368 F.2d 537 (4th Cir. 1966), *cert. denied*, 386 U.S. 976 (1967); *United States* v. *Lombardozzi*, 335 F.2d 414 (2nd Cir.), *cert. denied*, 379 U.S. 914 (1964).

prohibiting activities which would interfere with the operation of the University or would damage the property of Washington University or other persons on its premises. The contempt convictions were based upon the acts of the defendants on the night of May 4 and 5, 1970. The defendants now contend that the subsequent federal prosecutions for the same acts violate the double jeopardy standard.

The defendants base this argument on their view that *Waller* v. *Florida*, 397 U.S. 387 (1970) and *Ashe* v. *Swenson*, 397 U.S. 436 (1970), have undercut the holding[4] of *Abbate* v. *United States*, 359 U.S. 187 (1959).

We do not agree. *Waller* merely decided that, because of the identity of sovereigns, a state cannot prosecute a defendant for the same acts for which he has already been previously tried in a municipal court. The Supreme Court specifically reaffirmed *Abbate* in *Waller*. *Ashe* v. *Swenson*, *supra*, also involved dual state prosecutions for the same acts; thus it is not applicable to this case.

The Court recently held "* * * that the defense of double jeopardy does not bar successive prosecutions where * * * there is no identity of sovereigns * * *", even where the same conduct is involved and the elements of proof in the two cases are identical. *United States* v. *Synnes*, 438 F.2d 764, 773 (8th Cir. 1971).

The defendants also argue that there was an abuse of prosecutorial discretion in that a memorandum from the Department of Justice would have prohibited the federal

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4 In *Abbate* v. *United States*, 359 U.S. 187, 194 (1959), the Supreme Court specifically declined to overturn the rule announced in *United States* v. *Lanza*, 260 U.S. 377 (1922), that "* * * an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. * * *"

prosecution, following the state contempt prosecution, without the express approval of the Attorney General.[5] The evidence indicates that such approval was never obtained.

This is not the first time this argument has been raised before this Court, and we admit that it troubles us. The policy established by the memorandum is wise and ought to be followed. But here, as in *United States* v. *Synnes*, *supra* at 773, n. 11, we do not find adequate support in the record to justify setting aside Kogan's conviction. Mechanic did not raise the issue below. See, K. DAVIS, DISCRETIONARY JUSTICE (1969) at 162-187; Comment, The Right to Nondiscriminatory Enforcement of State Penal Laws, 61 COLUM. LAW REV. 1103 (1961).

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[5] "FOR RELEASE TO A.M. NEWSPAPERS
MONDAY, APRIL 6, 1959

"Ninety four United States Attorneys from as many districts in the states and territories, will convene here Monday for a two-day conference with officials of the Department of Justice. They will discuss problems of Federal law enforcement, with especial reference to the drive on organized crime and racketeering, and intra-departmental administrative matters.

"The group will be welcomed Monday morning by Attoney General William P. Rogers and one of the first matters to be presented to them will be the following statement:

"MEMORANDUM TO THE UNITED STATES ATTORNEYS

"In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.

"In *Abbate* v. *United States* and *Bartkus* v. *Illinois* the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.

"This ruling reaffirmed the holding in *United States* v. *Lanza*, 260 U.S. 377, decided by the Supreme Court in 1922. * * *

* * * * * *

"But the mere existence of a power, of course, does not mean that it should necessarily be exercised. * * *

JENCKS ACT

The defendants contend that the trial court should have struck the testimony of certain government witnesses because their trial testimony varied from statements they gave to FBI agents, and because the agents' original notes of the interviews were not produced.

The fact that variances exist between a witness's trial testimony and a pretrial statement does not mean that the testimony of the witness should be stricken. On the contrary, the purpose of the Jencks Act is to permit cross-examination and impeachment of the witness by pointing out such variances. See, *United States* v. *Missler*, 414 F.2d 1293 (4th Cir. 1969).

Several of the Government's witnesses were interviewed, shortly after the civil disorder, by FBI agents who made

* * * * * *

"The Court held then that precedent, experience and reason supported the conclusion of separate federal and state offenses.

"It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the

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rule of the *Lanza* case is sound law, enforcement officers should use care in applying it.

"Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently—as the Court clearly indicated—those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

"Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

"In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

"/s/ William P. Rogers Attorney General"

notes at the time of the interviews. These notes had been destroyed by the time of trial. The defendants argue that these notes should have been produced and, failing that, that the witnesses' testimony should have been stricken.

The ruling of a District Court on the producibility of statements under the Jencks Act will be disturbed only if it is clearly erroneous. *Hayes* v. *United States*, 329 F.2d 209 (8th Cir.), *cert. denied sub nom Bennett* v. *United States*, 377 U.S. 980 (1964); *Matthews* v. *United States*, 407 F.2d 1371 (5th Cir. 1969), *cert. denied*, 398 U.S. 968 (1970). Here, it appears the notes were destroyed in good faith in the course of normal procedure and only after they had been substantially incorporated into the typed summaries which were produced. Thus, the trial court's ruling was not clearly erroneous. *United States* v. *Lepiscopo*, 429 F.2d 258 (5th Cir.), *cert. denied*, 400 U.S. 948 (1970); *United States* v. *Covello*, 410 F.2d 536 (2nd Cir. 1968), *cert. denied*, 396 U.S. 879 (1969); *United States* v. *Hensley*, 374 F.2d 341 (5th Cir.), *cert. denied*, 388 U.S. 923 (1967).

SUFFICIENCY OF THE EVIDENCE

The defendants contend that, as a matter of law, the evidence was insufficient to sustain guilty verdicts. Their contention is valid only if the testimony of the chief prosecution witness, Donald Bird, is without credence.

There is evidence in the record that would indicate that Bird was a highly partisan witness who desired to see the defendants convicted. But the jury had an opportunity to observe him on the stand and thus could evaluate him more accurately than we can from a written record. If the jury believed Bird and disbelieved the defendants'

witnesses, we cannot say as a matter of law that the evidence was insufficient to convict the defendants. *United States of America* v. *Darris White,* No. 71-1223 (8th Cir. Nov. ..., 1971); *May* v. *United States,* 419 F.2d 553 (8th Cir. 1969).

The judgments of conviction are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

DEPARTMENT OF JUSTICE

FOR RELEASE TO A.M. NEWSPAPERS
MONDAY, APRIL 6, 1959

Ninety four United States Attorneys from as many districts in the states and territories, will convene here Monday for a two-day conference with officials of the Department of Justice. They will discuss problems of Federal law enforcement, with especial reference to the drive on organized crime and racketeering, and intra-departmental administrative matters.

The group will be welcomed Monday morning by Attorney General William P. Rogers and one of the first matters to be presented to them will be the following statement:

MEMORANDUM TO THE UNITED STATES ATTORNEYS

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.

In *Abbate v. United States* and *Bartkus v. Illinois* the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.

This ruling reaffirmed the holding in *United States v. Lanza*, 260 U.S. 377, decided by the Supreme Court in 1922. In that case Chief Justice Taft, speaking for a unanimous Court, said:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. In the *Bartkus* case the Court said:

> "The men who wrote the Constitution as well as the citizens of the member states of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution 'not to promote efficiency but to preclude the exercise of arbitrary power.' Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary *when the federal system yields results with which a court is in little sympathy.*"
> (Emphasis added)

The Court held then that precedent, experience and reason supported the conclusion of separate federal and state offenses.

It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest.

Consequently—as the Court clearly indicated—those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

/s/ William P. Rogers
Attorney General

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MICHAEL RODAK, JR., CLERK

No. 71-1056

In the Supreme Court of the United States

OCTOBER TERM, 1971

HOWARD MECHANIC AND LAWRENCE KOGAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
ROBERT C. MARDIAN,
Assistant Attorney General,
ROBERT L. KEUCH,
GEORGE W. CALHOUN,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 454 F.2d 849.

JURISDICTION

The judgment sought to be reviewed was entered on December 22, 1971. On January 13, 1972, the court denied a petition for rehearing. On February 2, 1972, Mr. Justice Blackmun entered an order extending the time for filing a petition for a writ of certiorari to and including February 19, 1972. The petition was filed on February 17, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

463-587—72

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause of the Fifth Amendment bars a federal prosecution for interference with policemen and firemen performing federally protected duties after a state conviction for contempt of court arising out of the same series of events.

2. Whether the Attorney General's Memorandum to the United States Attorneys, dealing with federal prosecutions for conduct previously subject to state prosecution bars the present prosecution.

STATUTES AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the Constitution provides in relevant part:

> * * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 231 provides:

> (3) Whoever commits or attempts to commit any act to obstruct, impede, or interfere with any fireman or law enforcement officer lawfully engaged in the lawful performance of his official duties incident to and during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function—
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On March 24, 1970, Washington University, which is located in St. Louis County, Missouri, obtained a temporary restraining order in a state court enjoining petitioners and others from engaging in disorderly conduct on university property (Pet. 2; Pet. App. 11a–12a).

On May 4, 1970, a large number of demonstrators marched to the Army and Air Force R.O.T.C. buildings, and threw stones and other objects at them (Pet. App. 2a). A fire broke out in the Air Force R.O.T.C. building, and a fire truck came to the scene but had to retreat under a heavy barrage of rocks, bottles and other items thrown by the crowd. A second fire truck similarly had to retreat. Upon arrival of a third fire truck, St. Louis County police attempted to form a protective screen between the firemen and the demonstrators. They also were subjected to a barrage of objects (Pet. App. 2a–3a). A witness saw each petitioner throw a cherry bomb at the police line (Pet. App. 3a).

Petitioners, with others, were found guilty of contempt for violating the restraining order, and each served part of a six-month sentence. (See *Mechanic* v. *Gruensfelder*, 461 S.W. 2d 298.) After their state contempt convictions, petitioners were indicted and convicted in federal court of interference with firemen and policemen lawfully engaged in federally protected duties (18 U.S.C. § 231(a)(3)). The court of appeals affirmed the convictions, rejecting petitioners' claims, among others, that their federal convic-

tions are barred by the Double Jeopardy Clause of the Fifth Amendment and are invalid because they violate the policy of the Justice Department, as stated in a Memorandum by the Attorney General to the United States Attorneys.

ARGUMENT

1. Petitioners contend that the Double Jeopardy Clause of the Fifth Amendment barred federal prosecution for their acts. This contention is without merit for two separate reasons. Even if the federal prosecution had followed a contempt conviction in a federal court, petitioners would not have been placed in jeopardy twice for the same offense. And even if the Double Jeopardy Clause would foreclose two convictions of the kinds involved here by a single sovereign, it does not bar a second conviction by a separate sovereign.

a. The Double Jeopardy Clause of the Fifth Amendment bars a prosecution only when a defendant has previously been placed in jeopardy for the same offense. *United States* v. *Ewell*, 383 U.S. 116. Here, petitioners' first offenses were for contempt of court for violating a temporary restraining order, and their second offenses were for interfering with federally-protected functions. The basic test to determine whether two acts constitute the same offense is whether each offense "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304; *Gore* v. *United States*, 357 U.S. 386; *Gavieres* v. *United States*, 220 U.S. 338. Here, the gravamen of the contempt was engaging in activity which disrupted the normal operations of the university. The presence of policemen or firemen was not a requisite of the offense.

Conversely, the gravamen of the second offense was interfering with policemen or firemen in the performance of their duties, and disruption to the university's operations was not a necessary element. Both convictions did rest in fact on the same acts, the throwing of cherry bombs at police officers, but the offenses were not the same because the necessary elements of proof were different. Although this Court has held that a conviction may not be based on a factual determination inconsistent with an earlier acquittal, *Ashe* v. *Swenson*, 397 U.S. 436, it has declined to adopt the position suggested by some members of the Court that subsequent prosecutions arising out of the "same transaction" are generally barred by the Double Jeopardy Clause (id. at 448–460, concurring opinion of Brennan, J.).

Moreover, contempt is a unique crime, *O'Neal* v. *United States*, 190 U.S. 36; *Bessette* v. *Conkey*, 194 U.S. 324. It is the only means by which a court can protect its authority, and it has consistently been held in the lower courts not to come within the ambit of the Double Jeopardy Clause of the Fifth Amendment. *United States* v. *Rollerson*, 449 F. 2d 1000 (C.A. D.C.);[1] *O'Malley* v. *United States*, 128 F.2d 676 (C.A. 8), reversed on other grounds, 317 U.S. 412; *Merchants' Stock and Grain Co.* v. *Board of Trade*, 201 Fed. 20 (C.A. 8); *United States* v. *Mirra*, 220 F. Supp. 361 (S.D.N.Y.).

[1] In *Rollerson*, the defendant, while on trial, threw a water pitcher at the prosecutor. As a result of the same act, the defendant was held in criminal contempt and later was indicted and prosecuted for assault with a dangerous weapon and assault of a federal officer in performance of his official duties.

b. Even if the offenses were the same there would be no double jeopardy in this case, because the convictions were by separate sovereigns. As petitioners acknowledge (Pet. 5), their argument to the contrary is inconsistent with *Abbate* v. *United States*, 359 U.S. 187.

Pointing to this Court's decisions in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, and *Benton* v. *Maryland*, 395 U.S. 784, petitioners contend that this Court has all but discarded the "separate sovereignty" theory and that because *Abbate* was grounded on that theory, *Murphy* and *Benton* have in effect "excised the theoretical underpinning of * * * *Abbate*" (Pet. 6). Petitioners ask this Court to review *Abbate* in light of *Murphy* and *Benton*.

However, in *Waller* v. *Florida*, 397 U.S. 387, in rejecting a claim of separate sovereignty between a state and a municipal court, this Court implicitly affirmed the principle of *Abbate*. Moreover that principle has consistently been applied by federal courts.[2]

2. Petitioners contend that then Attorney General Rogers' Memorandum to the United States Attorneys

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[2] *See e.g., Waller* v. *Florida*, 397 U.S. 387; *United States* v. *Jakubaki*, 267 F.2d 669 (C.A. 7), *certiorari denied*, 362 U.S. 936; *Hoopingarner* v. *United States*, 210 F.2d 465 (C.A. 6); *Feiring* v. *United States*, 340 F.2d 837 (C.A. 8), certiorari denied, 381 U.S. 902; *Colton* v. *United States*, 407 F.2d 367 (C.A. 8); *United States* v. *Hutul*, 416 F.2d 667 (C.A. 7); *Hill* v. *Reto*, 422 F.2d 840 (C.A. 5); *United States* v. *Symons*, 438 F.2d 764 (C.A. 8); *United States* v. *Smith*, 446 F.2d 200 (C.A. 4).

(Pet. App. B)[3] should bar the present action because the United States Attorney did not seek or receive express approval of the Department of Justice for the federal prosecutions of petitioners. However, the Memorandum "was simply a housekeeping provision of the [Justice] Department * * *." *Sullivan* v. *United States*, 348 U.S. 170, 173. See also, *United States* v. *Hutul*, 416 F.2d 607 (C.A. 7).

Petitioners' reliance on *Petite* v. *United States*, 361 U.S. 529, and *Redmond*, v. *United States*, 384 U.S. 264, is misplaced. In those cases the government voluntarily moved to vacate the lower court's decisions. There was no holding of this Court that the government was required to do so. See, e.g., *Petite*, *supra*, at 531.

Moreover, it is the view of the government that the Memorandum was not applicable here. Although the Memorandum refers to prosecutions based on the "same act or acts," the thrust of the Memorandum is to discourage duplicity of prosecution for the same essential crime, and the contempt conviction would not be considered a state prosecution within the meaning of the Memorandum. For this reason, the United States Attorney could not have been expected to conclude that authorization for the suit was required by the Memorandum.

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[3] The Memorandum advises United States Attorneys that the Justice Department should not prosecute a defendant under federal law after he has been prosecuted under state law for the same act or acts without compelling reasons and prior approval by an Assistant Attorney General.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

ERWIN N. GRISWOLD,
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APRIL 1972.

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